IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Misc. No. 76-1518

HAROLD BLACK, WARDEN ..... PETITIONER

V.

DOUGLAS ANTHONY HOLT ..... RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT F. STEPHENS
ATTORNEY GENERAL

ROBERT L. CHENOWETH
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR PETITIONER

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The petitioner, Harold Black, respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit decided March 3, 1977.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case is as yet unreported. The opinion is set out in full in the Appendix, 1a through 9a.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit was decided and filed on March 3, 1977. This petition for a writ of certiorari was filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER THIS COURT'S HOLDING IN BREED V. JONES, 421 U.S. 519 (MAY 27, 1975) APPLYING THE CONSTITUTIONAL DOUBLE JEOPARDY PROVISION TO JUVENILE PROCEEDINGS SHOULD BE GIVEN RETROACTIVE EFFECT.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved are the Fifth and Fourteenth Amendments.

STATEMENT OF THE FACTS AND OF THE CASE

Douglas Anthony Holt, respondent herein, was arrested in Louisville, Jefferson County, Kentucky, on November 11, 1972, and charged with wilful murder and armed robbery. At the time he was seventeen years of age and therefore subject to the exclusive jurisdiction of the Juvenile Division of the Jefferson County Court, hereafter referred to as the Juvenile Court. KRS 208.020(1). On December 21, 1972, an adjudicatory hearing was held at which Holt was tried by the Juvenile Court and found guilty of wilful murder and armed robbery.

On January 11, 1973, after a hearing the Juvenile

Court entered an order waiving its jurisdiction over Holt to the Jefferson Circuit Court Criminal Division, under the authority of KRS 208.170, and thereby referred Holt to the Jefferson County Grand Jury for consideration as an adult under the regular laws governing crimes. The Jefferson County Grand Jury returned an indictment on February 6, 1973, charging him with wilful murder and armed robbery.

On October 2, 1973, with counsel present, Holt pleaded guilty to charges of voluntary manslaughter and armed robbery and was sentenced to twenty-one years on each charge, with the sentence on the armed robbery charge being withheld on condition that he remain on good behavior for five years after his release from the penitentiary on the voluntary manslaughter sentence.

Holt sought post-conviction relief under Kentucky Rule of Criminal Procedure 11.42 and his motion was denied June 21, 1974. Holt appealed this denial to the then highest appellate court in Kentucky, the Kentucky Court of Appeals. The appeal was denied on July 8, 1975. *Holt* v. *Commonwealth*, Ky., 525 S.W.2d 660 (1975).

Holt then filed a petition for writ of habeas corpus in the United States District Court for the Western District of Kentucky at Louisville. One of the grounds stated in the petition was that Holt had been placed on trial as an adult in the Jefferson Circuit Court in violation of right protected by the Fifth and Fourteenth Amendments to the United States Constitution not to twice be placed in jeopardy for the same offense. By order dated December 19, 1975, and entered of record on

December 22, 1975, the District Court dismissed the petition. See the Appendix, 10a-11a. The District Court denied retroactive application of this Court's decision in *Breed* v. *Jones,* 421 U.S. 519 (May 27, 1975).

The District Court granted a certificate of probable cause to appeal and an appeal was thereafter taken to the United States Court of Appeals for the Sixth Circuit. In an opinion rendered March 3, 1977, the Sixth Circuit held that *Breed* v. *Jones, supra,* should be applied retroactively to this case. It is from this opinion and order of the United States Court of Appeals for the Sixth Circuit that a review is sought.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit has decided an important constitutional question presented by this case which has not been but should be decided by this Court.

As stated in the Sixth Circuit's opinion by Honorable George Edwards, Judge, Sixth Circuit Court of Appeals this case deals with "a pure question of law -- Is this case controlled, retroactively or retrospectively, by the Supreme Court's interpretation of the applicability of the double jeopardy clause of the United States Constitution in *Breed* v. *Jones,* supra, so as to render void appellant's Circuit Court sentence because, prior to its entry, he had been adjudicated a juvenile delinquent for the same crime?" Appendix, 2-a. This Court in *Breed* v. *Jones,* 421 U.S. 519 (1975), held that the subsequent trial and conviction following waiver by the California juvenile court resulted in the juvenile being placed in jeopardy for

a second time. This Court in *Breed* specifically held that the juvenile was placed in jeopardy at the time of the adjudicatory hearing, since that hearing could have resulted in a disposition under the juvenile law, including confinement up to age twenty-one. Chief Justice Burger, who delivered the opinion in *Breed* for a unanimous Court, stated in this regard:

> "We therefore conclude that respondent was put in jeopardy at the adjudicatory hearing. Jeopardy attached when respondent was 'put to trial before the trier of the facts,' ibid., that is, when the Juvenile Court, as the trier of the facts, began to hear evidence." (Citation omitted.) 421 U.S. at 531.

Counsel for the petitioner herein conceded, beginning in the consideration of the petition for writ of habeas corpus in the District Court, that in light of the holding in *Breed,* that Holt was placed in jeopardy in this case the second time when he was indicted and held to answer to that indictment in the Jefferson Circuit Court. There can be no questioning of the fact that an adjudicatory consideration of Holt's case was effected in the Juvenile Court. The Juvenile Court adjudicatory hearing date in the case at bar was December 21, 1972. On January 11, 1973, Holt's case was waived to the circuit court. On October 2, 1973, Holt pleaded guilty, after an indictment had been returned in circuit court, to the criminal offenses of voluntary manslaughter and armed robbery. The *Breed* v. *Jones* decision by this Court was not rendered until May 27, 1975.

In issue in this case is the guarantee contained in the Fifth Amendment applicable to the States by reason

of the Fourteenth Amendment that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." *Benton* v. *Maryland,* 395 U.S. 784 (1969). The application of the Double Jeopardy Clause to the States was applied retroactively in *North Carolina* v. *Pearce,* 395 U.S. 711 (1969) and *Ashe* v. *Swenson,* 397 U.S. 436 (1970). However, the application retroactively of the *Benton* decision, supra, does not call for *a fortiori* the holding of this Court's *Breed* decision be applied retroactively. That is, the petitioner submits that it does not automatically follow that every new pronouncement by this Court dealing with the protection of the double jeopardy provision should have retroactive effect. We believe the application of a constitutional rule retroactively must rest on a consideration of the particular circumstances in question; on the exigencies of the situation. When so considered, petitioner submits the new law announced in *Breed* v. *Jones* by this Court should be denied retroactive effect.

The contours of the retroactivity inquiry were for all practical purposes charted by this Court in *Linkletter* v. *Walker,* 381 U.S. 618 (1965). In determining whether a new constitutional principle should be applied retroactively, this Court has since *Linkletter* considered the following three factors: (1) the purpose to be served by the new standards; (2) the extent of reliance on the old standards, and (3) the effect on the administration of justice of a retroactive application of the new standards. Upon the authority of *Linkletter,* the District Court in this case denied retroactive application of the *Breed* decision. Appendix, 10a-11a.

The Sixth Circuit Court believed reliance upon *Linkletter* to determine whether the *Breed* decision should be retroactively applied to this case was misplaced. The Sixth Circuit stated that the decision of this Court in *Robinson* v. *Neil,* 409 U.S. 505 (1973,) which applied the holding of *Waller* v. *Florida,* 406 U.S. 916 (1972), retroactively was more relevant than the general retroactivity analysis of *Linkletter.* The holding in *Waller* was that a state and municipality could not be treated as separate sovereignties for purposes of double jeopardy and that successive municipal and state prosecutions for offenses arising from the same circumstances was unconstitutional. Mr. Justice Rehnquist looked at the Court's decision in *Linkletter* and stated he did not believe the retroactivity analysis of that case could be readily applied to the double jeopardy issue at hand in *Robinson* in that *Linkletter* and the subsequent cases establishing guiding criteria for retroactivity were concerned with procedural rights or trial methods. 409 U.S. 507-508. Mr. Justice Rehnquist further stated, 409 U.S. 509:

> "The guarantee against double jeopardy is significantly different from procedural guarantees held in the Linkletter line of cases to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial."

We do not believe this Court explicitly enunciated a new test to be applied in determining the retroactivity of a nonprocedural constitutional rule such as the guarantee

against double jeopardy. In fact, we believe this Court in *Robinson* made clear that the elements of reliance and prejudice to the state in the three-pronged test will not be wholly absent in determining the effect to a new non-procedural constitutional rule. Mr. Justice Rehnquist stated in this regard:

> "We would not suggest that the distinction that we draw is an ironclad one that will invariably result in the easy classification of cases in one category or the other." 409 U.S. 509.

Thus, it is the petitioner's position that unless the retroactivity of a particular issue is going to be held retroactive or prospective solely on the basis of some classification, e.g., double jeopardy, we believe a variety of factors similar to the three-pronged analysis aforementioned must be considered in each case, and at least the factors of reliance and prejudice to the state.

There is strong justification for not applying the decision in *Breed* retroactively. It is fair to say the holding in *Breed* was to provide juveniles the same protection enjoyed by adults of not being subjected to jeopardy twice for the same offense. In the Sixth Circuit's opinion in this case, it was reflected that such an application of the double jeopardy protection to juvenile proceedings should have been considered "complete" in 1969 with the *Benton* decision. Petitioner would not begin to say that Kentucky nor any other state should have been surprised at applying the double jeopardy protection to juvenile proceedings. A fair number of decisions in various states' courts had stated long prior to *Breed* that double jeopardy

was applicable to juvenile proceedings. However, many of these cases, for example most of those cited in the Sixth Circuit's opinion, involved situations where there had either been an acquittal in juvenile court with a subsequent indictment in an adult court based upon the same alleged offense or the juvenile court had committed the juvenile to a juvenile facility upon a finding of delinquency and then a subsequent indictment in adult court. Thus, the consideration of whether the double jeopardy provision applied to juvenile proceedings and when States should have discerned this, is not as easy as the Sixth Circuit's opinion would lead one to believe. Courts considering the double jeopardy question with respect to juvenile proceedings actually had to deal with two questions: (1) whether the protection of the double jeopardy provision applied to juvenile proceedings as conducted under a particular State's law, and then more importantly, if this first question was answered in the affirmative; (2) *when* during the proceedings jeopardy should be held to attach. This Court's pronouncement in *Breed* pin-pointed quite precisely that jeopardy attached when the juevnile court began to hear evidence as the trier of fact. *Breed* v. *Jones*, 421 U.S. at 531. The *Breed* holding was not just that an adjudication of delinquency in juvenile court bars subsequent criminal prosecution for the same offense. That is, that a second trial could not follow based on the same facts after a juvenile court found a child delinquent and committed the child to the juvenile court rehabilitation authorities or otherwise disposed of the case. The *Breed* decision definitely established the standard as to when jeopardy attached in the juvenile proceedings. Even those courts that had decided jeopardy attached

after adjudication of delinquency in a juvenile proceeding were caught short in view of the *Breed* decision. See, for example, *Fain* v. *Duff,* 488 F.2d 218 (5th Cir. 1973), one of the first federal court cases wherein it was held jeopardy attached when a juvenile had been found to be delinquent and committed to a juvenile facility, which decision had not been rendered when Holt was brought before the Juvenile Court.

Thus, while the Sixth Circuit may have accurately concluded that the fundamental change in constitutional law concerning application of double jeopardy took place before Holt's trial in 1973, the determination of *when* jeopardy attached in a juvenile proceeding was not resolved until the *Breed* decision in 1975. All the cases in other courts holding that a second proceeding against a juvenile after acquittal in juvenile court or mistrial in juvenile court caused by actions of the prosecution were not beneficial to the states in foreseeing the *Breed* decision by this Court.

It is petitioner's position that this Court should deny retroactive application of the *Breed* decision because to apply the decision retroactively would require consideration in each case where a waiver took place when a particular juvenile proceeding had developed past a probable cause determination before the waiver was effected. Determining when an adjudicatory type of hearing or consideration of a case commenced is not all that easy to do. Kentucky's juvenile law called for an informal consideration of a child's case and provided that all hearings, including an adjudicatory hearing, may be conducted in an informal manner. KRS 208.060. Some evidence about

the charges and the circumstances surrounding the charges is going to be heard if for no other reason that to assist the juvenile court in accepting jurisdiction over a child or to determine if there is probable cause to detain a child. Hearing evidence against a child for these purposes as contrasted with hearing evidence for adjudication by the juvenile court may be quite blurred. Kentucky's juvenile law (KRS 208.170) provided that the decision to waive a juvenile's case to the circuit court may come "during the course of any proceeding." In Kentucky, then, if the juvenile court was following what the statutes permitted. under the *Breed* decision every one of the cases considered which resulted in a waiver could be subject to the attack that jeopardy attached. Again, it is not that this Court in *Breed* decided that the double jeopardy provision applies to juvenile proceedings that is critical but the point in the juvenile proceedings double jeopardy was said to attach is severely critical when the retroactive application of that designation of "when" is considered. The designation of the point of attachment presents the problem that in view of the juvenile statutes governing proceedings, at least in Kentucky, there was not necessarily a definitive point in the proceedings that can always be isolated such as to be able to say where the court started hearing testimony or considering evidence for a determination of the truthfulness of the alleged charges which would be tantamount to the commencement of an adjudicatory consideration of the case. Transcripts of juvenile court proceedings are not kept in most juvenile courts in Kentucky which is probably not unlike the situation found in other states. Limited as juvenile court records

usually are, little or no help could be expected from the records on resolving when the adjudicatory consideration of the case by the juvenile judge was started. Unlike the obviousness of the swearing of the jury in an adult criminal action, there may not be any clear signal noticeable in juvenile cases considered prior to *Breed* indicating when the juvenile court was merely taking evidence for purposes of determining probable cause and when it was taking evidence in what might be labeled an adjudicatory hearing.

In view of the above, petitioner submits there existed no case to foreshadow the designation of *when* double jeopardy was held to apply in juvenile proceedings in *Breed*. Furthermore, that to apply the *Breed* decision retroactively to cases considered in informal juvenile proceedings where considerable difficulty may be experienced in establishing exactly when an adjudicatory proceeding actually commenced would have a severe impact on the administration of justice.

CONCLUSION

Petitioner submits that it is necessary for this Court to review the decision of the Sixth Circuit which discounted the truly critical designation of when in the juvenile proceedings double jeopardy was held to attach in the *Breed* decision of this Court and the impact a retroactive application of that designation would have in the juvenile courts. The lower courts, federal and state,

need to be advised whether to apply this Court's decision in *Breed* retroactively.

Respectfully Submitted,

ROBERT F. STEPHENS
ATTORNEY GENERAL

ROBERT L. CHENOWETH
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR PETITIONER

PROOF OF SERVICE

I, Robert L. Chenoweth, one of counsel for the petitioner, hereby certify that three (3) copies of the foregoing brief were mailed, postage prepaid, to Honorable Dudley R. Spiller, Jr., 1644 Emerson Street, Denver, Colorado 80218, counsel for respondent, this May 6, 1977.

Robert L. Chenoweth

ROBERT L. CHENOWETH
Assistant Attorney General
Commonwealth of Kentucky

APPENDIX

APPENDIX A

RECEIVED MARCH 4, 1977

No. 76-1202

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DOUGLAS ANTHONY HOLT,
Plaintiff-Appellant,

VS.

HAROLD BLACK, WARDEN,
Defendant-Appellee.

APPEAL from United States District Court for the Western District of Kentucky.

Decided and filed March 3, 1977.

Before: WEICK, EDWARDS and PECK, Circuit Judges.

EDWARDS, Circuit Judge. Appellant Holt is serving a 21-year sentence for voluntary manslaughter after a plea of guilty in the Circuit Court of Jefferson County, Kentucky, entered October 2, 1973. Prior to his indictment and plea of guilty in the Circuit Court, appellant, a juvenile under Kentucky law,[1] had been adjudicated a

[1]Holt was 17 at the time of the crime and hence subject to jurisdiction of the Juvenile Court. (See K.R.S. § 208.020(1)).

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delinquent after a hearing in Jefferson County's Juvenile Court wherein the delinquency petition was based upon the same crime to which his October 2, 1973, Circuit Court plea was entered.

Further detailed facts in this matter are unnecessary to decision, since defendant-appellee Black, through the brief of the Attorney General of Kentucky, concedes that "in the light of the holding in *Breed* [*Breed v. Jones*, 421 U.S. 519 (1975)] the appellant was placed in jeopardy in this case the second time when he was indicted and held to answer to that indictment in the Jefferson Circuit Court." Thus we deal in this case with a pure question of law -- Is this case controlled, retroactively or retrospectively, by the Supreme Court's interpretation of the applicability of the double jeopardy clause of the United States Constitution in *Breed* v. *Jones, supra,* so as to render void appellant's Circuit Court sentence because, prior to its entry, he had been adjudicated a juvenile delinquent for the same crime?

The Fifth Amendment to the United States Constitution provides in part:

> No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb. . . .

In the *Breed* case Chief Justice Burger held for a unanimous Court:

> [T]he risk to which the term jeopardy refers is that traditionally associated with actions intended to authorize criminal punishment to vindicate public

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justice." *United States ex rel. Marcus v. Hess* [317 U.S. 537], at 548-549. Because of its purpose and potential consequences, and the nature and resources of the State, such a proceeding imposes heavy pressures and burdens -- psychological, physical, and financial -- on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to the experience only once "for the same offence." See *Green* v. *United States*, 355 U.S. 184, 187, (1957); *Price* v. *Georgia*, 398 U.S. [323 (1970], at 331; *United States* v. *Jorn*, 400 U.S. 470, 479 (1971 (opinion of Harlan, J.).

In *In re Gault*, [387 U.S. 1 (1967)], at 36, this Court concluded that, for purposes of the right to counsel, a "proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." See *In re Winship*, [397 U.S. 358 (1970)], at 366. The Court stated that the term "delinquent" had "come to involve only slightly less stigma than the term 'criminal' applied to adults," *In re Gault, supra,* at 24; see *In re Winship, supra,* at 367, and that, for purposes of the privilege against self-incrimination, 'commitment is a deprivation of liberty. It is incarceration against ones will, whether it is called 'criminal' or 'civil.'"

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In re Gault, supra, at 50. See 387 U.S., at 27; *In re Winship, supra,* at 367.[12]

* * * *

We deal here, not with "the formalities of the criminal adjudicative process," *McKeiver* v. *Pennsylvania,* 403 U.S. [528 (1970)], at 551 (opinion of BLACKMUN, J.), but with an analysis of an aspect of the juvenile court system in terms of the kind of risk to which jeopardy refers. Under our decisions we can find no persuasive distinction in that regard between the proceeding conducted in this case pursuant to Cal. Welf. & Inst'ns Code § 701 and a criminal prosecution, each of which is designed "to vindicate [the] very vital interest in enforcement of criminal laws. *United States v. Jorn, supra,* at 479. We therefore conclude that respondent was put in jeopardy at the adjudicatory hearing. Jeopardy attached when respondent was "put to trial before the trier of the facts," *ibid.,* that is, when the Juvenile Court, as the trier of the facts, began to hear evi-

[12]Nor does the fact "that the purpose of the commitment is rehabilitative and not punitive . . . change its nature. . . . Regardless of the purposes for which the incarceration is imposed, the fact remains that it is incarceration. The rehabilitative goals of the system are admirable, but they do not change the drastic nature of the action taken. Incarceration of adults is also intended to produce rehabilitation." Fain v. Duff, 488 F. 2d, at 225. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 8-9 (1967).

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dence. See *Serfass v. United States,* 420 U.S., [377 (1975)], at 388.[13]

The Kentucky Attorney General, of course, does not dispute the holding of the *Breed* case, but does argue that it should not be applied to the instant conviction and sentence because they occurred in 1973 -- well before the *Breed* decision in May of 1975. He contends that *Breed* should not be applied "retroactively" under the analysis contained in *Linkletter* v. *Walker,* 381 U.S. 618 (1965). The District Judge in our instant case agreed *Breed* should not be applied retroactively. We believe, however, that the application of retroactivity of a Florida double jeopardy holding (*See Waller* v. *Florida,* 397 U.S. 387 (1970)) in *Robinson* v. *Neil,* 409 U.S. 505 (1973), is much more relevant to our instant appeal than the general retroactivity analysis of *Linkletter* v. *Walker, supra.* As a consequence, we reverse and remand this case to the District Court for issuance of the writ.

Seven years ago in *Benton* v. *Maryland,* 395 U.S. 784 (1969), the United States Supreme Court first held that the double jeopardy clause of the Fifth Amendment applied to the states by operation of the Fourteenth Amendment. In *Waller* v. *Florida, supra,* the Supreme

[13]The same conclusion was reached by the California Court of Appeal in denyng respondent's petition for a writ of habeas corpus. In re Gary, J., 17 Cal. App. 3d 704, 710, 95 Cal. Rptr. 185, 189 (1971).

Breed v. *Jones,* 421 U.S. 519, 519-31 (1975).

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Court held that the "dual sovereignty" doctrine by which Florida justified prosecuting the same offense in separate municipal and state proceedings offended the double jeopardy clause. In *Robinson* v. *Neil, supra,* the United States Supreme Court specifically determined that *Waller* should be applied retroactively. The Court unanimously held:

> The prohibition against being placed in double jeopardy is likewise not readily susceptible of analysis under the *Linkletter* line of cases.
>
> The guarantee against double jeopardy is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial. A number of the constitutional rules applied prospectively only under the *Linkletter* cases were found not to affect the basic fairness of the earlier trial, but to have been directed instead to collateral purposes such as the deterence of unlawful police conduct, *Mapp* v. *Ohio,* [367 U.S. 643 (1961)]. In *Waller,* however, the Court's ruling was squarely directed to the prevention of the second trial's taking place at all, even though it might have been conducted with a scrupulous regard for all of the constitutional procedural rights of the defendant.

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Robinson v. *Neil,* 409 U.S. 505, 508-09 (1973).

We regard this language to be dispositive of this appeal. It commands reversal of this case and remand for issuance of the writ of habeas corpus. We should, however, add that if we were to determine this case under *Linkletter* v. *Walker, supra,* as the Kentucky Attorney General urges, we would still reach the same result. As we see the matter, the fundamental changes in constitutional law which require reversal of this case occurred well before appellant's trial in 1973. In *Kent* v. *United States,* 383 U.S. 541 (1966), and *In re Gault,* 387 U.S. 1 (1967), the Supreme Court decisively rejected any Constitutional distinction between the "civil" law nature of Juvenile Court proceedings and the "criminal" law nature of courts of general adult jurisdiction. When in 1969 the Supreme Court held for the first time that the double jeopardy clause was applicable to the states through the Fourteenth Amendment, the constitutional ban upon two prosecutions -- one in a juvenile court adjudication and the other (after waiver) in the adult criminal court -- was complete. Since *Benton* and before *Breed* a number of states have held that the double jeopardy clause of the United States Constitution applied to juveniles. *See, e.g., Coleman* v. *Superior Court,* 110 Ariz. 386, 519 P.2d 851 (1974); *People* v. *P.L.V.,* 490 P.2d 685 (Colo. 1971); *State* v. *Gibbs,* 94 Idaho 908, 500 P.2d 209 (1972); *Tolliver* v. *Judges of Family Court,* 59 Misc.2d 104, 298 N.Y.S.2d 237 (Sup. Ct. 1969); *In re Gilbert,* 45 Ohio App.2d 308, 345 N.E.2d 79 (1974); *In re Knox,* 532 P.2d

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245 (Ore. Ct. App. 1975); *Tennessee* v. *Jackson,* 503 S.W.2d 185 (Tenn. 1973); *State* v. *Marshall,* 503 S.W.2d 875 (Tex. Civ. App. 1973); *Collins* v. *State,* 429 S.W.2d (Tex. Civ. App. 1969); *District of Columbia* v. *I. P.,* 335 A.2d 224 (D.C. Ct. App. 1975). *Compare Locke* v. *Commonwealth,* 503 S.W.2d 720 (Ky 1974).

Two Circuit Courts of Appeals had also forseen the result which the Supreme Court, on the basis of its own precedents, was bound to reach. *See Fain* v. *Duff,* 488 F.2d 218 (5th Cir. 1973), *cert. denied,* 421 U.S. 999 (1975) and *Jones* v. *Breed,* 497 F.2d 1160 (9th Cir. 1974), *vacated,* 421 U.S. 519 (1975). As noted earlier in this opinion, the Supreme Court opinion in *Breed v. Jones, supra,* followed in 1975. Our point, is that in 1973 when appellant was tried twice for the same offence in the state courts of Kentucky, there was then no basis for reliance upon any United States Supreme Court opinion which could be read as allowing that practice in the face of the double jeopardy clause.

Finally, we noted that the Kentucky Attorney General cites factual difficulty in ascertaining when jeopardy attached in Kentucky Juvenile Court hearings. In effect he suggests that the taking of any evidence pertaining to an offense, whether at a preliminary hearing, a hearing on waiver, or an adjudicatory hearing might under *Breed* be held to establish jeopardy for constitutional purposes. We do not so read *Breed* v. *Jones, supra.* Clearly it refers solely to an adjudicatory hearing. The *Breed opinion* states:

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> We therefore conclude that respondent was put in jeopardy at the adjudicatory hearing. Jeopardy attached when respondent was "put to trial before the trier of the facts," *ibid.,* that is when the Juvenile Court, as the trier of the facts, began to hear evidence. See *Serfass* v. *United States,* 420 U.S. at 388. *Breed* v. *Jones, supra* at 531. (Footnote omitted.)

And, of course, in our instant case, the Attorney General has conceded that jeopardy attached in both the Juvenile Court and the Circuit Court of Jefferson County.

In view of what has been said above and the reversal and remand which is called for, the other questions posed by appellant are unnecessary to decision.

Reversed and remanded to the District Court for further proceedings consistent with this opinion.

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* * * * * *

The last contention of petitioner relates to double jeopardy, and it centers around the adjudication hearing of December 21. This hearing was required by KRS 208.060 for the purpose of determining beyond a reasonable doubt the truth or falsity of the charge. This hearing was followed by a dispositional hearing which resulted in the waiver by the juvenile court of its jurisdiction over to the circuit court. It is a fair assessment of the relative positions of the parties to this action to state that they acknowledge that the adjudication hearing of December 21 suffers the same infirmity as did the adjudication hearing condemned in *Breed* v. *Jones,* supra. The respondent concedes that the adjudication hearing was "in every sense a court trial . . . [at which] not only was a determination of guilt . . . possible, but such a determination was actually made . . ." Because this hearing could have resulted (but did not) in a dispostiion of the charges under the juvenile law, petitioner was placed in jeopardy at that hearing. The subsequent trial in Circuit Court constituted double jeopardy, contrary to the Fifth and Fourteenth Amendments.

Petitioner's case predated the *Breed* decision by approximately two years. He urges that we apply *Breed* retroactively. Respondent urges that *Breed* should be given prospective application only. The parties have briefed the issue thoroughly and ably. We prefer, however, to deny retroactive application upon the authority of *Link-*

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letter v. *Walker,* 381 U.S. 618 (1965), cited at page 23 of Respondent's Memorandum of Authorities contrary to petitioner's assertion at page 21 of his First Supplemental Brief. Petitioner asserts that *Waller* v. *Florida,* 397 U.S. 387 (1970) requires that *Breed* be applied retroactively. We disagree. Although petitioner may have been twice put to trial, and thus twice in jeopardy, he has not been punished twice. The adjudication hearing could have resulted in disposition of the charges, but it did not.

Accordingly, a separate judgment will this date be entered dismissing the petition.

Date: December 19, 1975

/s/ Rhodes Bratcher

RHODES BRATCHER
United States District Judge